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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1708

MARILYN SHAPIRO,
Petitioner,

vs.

COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT, COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, TRUSTEE, IN OPPOSITION

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COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, ET AL.,
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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT, COLUMBIA UNION NATIONAL BANK AND TRUST COMPANY, TRUSTEE, IN OPPOSITION

The Respondent, Columbia Union National Bank and Trust Company, Trustee, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of Missouri in this case. That opinion is reported at 576 S.W.2d 310.

QUESTIONS PRESENTED

The Petitioner has submitted two questions for review (Pet. 3). Regrettably, the questions, as presented, distort the decision of the Court below and are argumentative.

The decision of the Supreme Court of Missouri below presents the following questions:

1. Whether the Court erred in concluding that the dismissal of Petitioner's Second Amended Petition was proper in that no state action inhered in the administration of the Victor Wilson Trust based upon alleged violations of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.

2. Whether the Court, on the basis of the record before it, erred in upholding the dismissal of Petitioner's Second Amended Petition.

STATEMENT OF THE CASE

As a result of certain inaccuracies and improper references contained in Petitioner's Statement of Facts, Respondent Trustee finds it necessary to make a brief additional statement.

Petitioner correctly quotes the relevant provisions of Article VIII of the Last Will and Testament of Victor Wilson (Pet. 4-5). Under the terms of Article VIII, the Will limits the class of beneficiaries of the Trust to "deserving Kansas City, Missouri boys" to acquire an education at either Yale University or the University of Missouri at Kansas City ("UMKC"). There is no question in this case that females are not within the scope of the testator's designated beneficiaries.

The specific procedures involved in the award of funds by the Respondent Trustee from the Trust Fund were as found by the Supreme Court of Missouri as follows:

> "The 'process and precedure' for disbursing scholarship funds under the Victor Wilson Trust, as we garner it from the petition, answers to interrogatories, and the motions to dismiss, are as follows: (1) information concerning the Victor Wilson Scholarship is

> widely disseminated and appears in the under-graduate catalog, (2) general university applications are completed by an applicant and filed with the student financial aid office, (3) a financial statement is also completed, (4) the financial statement is processed by a nationally recognized agency, (5) the student financial aid office receives reports of academic standing of the applicant which must be roughly in the top quartile of entering and continuing male students, (6) when all files are completed they are forwarded to a professional staff within the University which reviews the eligible candidates, (7) the professional staff forwards the names of those persons within the class established by the trust and makes a 'tentative award' subject to the approval of the private trustee and the recommendation letters are forwarded to the trustee bank for 'approval' and (8) after such approval by the private trustee the University informs the male students of their awards. The University does not, however, recommend any female students." 576 S.W.2d 310, 317.

The Supreme Court of Missouri further found in characterizing the facts in this case:

> ". . . The final decision whether an individual is awarded a scholarship is that of the private trustee. The 'process and procedure' of the University has not so far 'insinuated itself' in the administration of the trust so that the action is that of the state nor can the challenged action be treated as ultimately that of the state.
>
> The university has no discretion under the terms of the trust to forward the names of women to the private trustee; the discretion exists only as to those members within the class who are recommended for final selection by the trustee. . . ." 576 S.W.2d 310, 321.

REASONS FOR DENYING THE WRIT

I

The Decision of the Supreme Court of Missouri Applies Established Principles Governing the Determination of the Existence of State Action, and Raises No Question Justifying the Issuance of the Writ of Certiorari

The rather pretentious tone of the Petition, in referring to the "nation's public colleges and universities" as needing guidance in this area (Pet. 12) belies the routine nature of the issue tendered for review, and the undeniably correct manner in which the Supreme Court of Missouri resolved that issue. Petitioner does no more here than to repeat the same arguments raised by her before the Supreme Court of Missouri and thoroughly considered by that Court. She argues only that the Supreme Court of Missouri was erroneously unpersuaded by her arguments. She does not assert that that Court significantly departed from the accepted and usual course of judicial proceedings. In short, Petitioner offers no persuasive assertion of any of the reasons for granting certiorari as enumerated in Rule 19(a) of the Revised Rules of this Court.

Petitioner alleged in her Second Amended Petition that the Victor Wilson Trust operated in violation of, *inter alia*, the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983. The capstone issues presented, as considered by the Court below, were whether "state action" was involved so as to invite an examination of the alleged discrimination under the Fourteenth Amendment [*The Civil Rights Cases*, 109 U.S. 3, 11 (1883)] and whether the administration of the Trust had been carried out "under color of law" equivalent to "state action"

for purposes of §1983 [*Adams* v. *So. Calif. First Nat'l Bank*, 492 F.2d 324, 329 (9th Cir. 1973)].

Simply put, this case presented an application of the "sifting facts and weighing circumstances" test which this Court enunciated in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). Presented to the Supreme Court of Missouri was the essential dichotomy which this Court early recognized in *The Civil Rights Cases, supra*, between discriminatory action by the state which is prohibited by the Equal Protection Clause of the Fourteenth Amendment and private conduct, "however discriminatory and wrongful," against which that Clause, as this Court has put it in *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1947), "erects no shield."

Although it is axiomatic that "the great body of the law consists in drawing . . . lines" (*Schlesinger* v. *Wisconsin*, 270 U.S. 230, 241 (1926) [dissenting opinion]), *Burton* does not establish a bright line standard. However, the Supreme Court of Missouri did properly sift the relevant facts and circumstances as prescribed by the *Burton* test as applied by this Court to charitable trusts in *Evans* v. *Newton*, 382 U.S. 296, 299-300 (1966). See also, *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U.S. 230 (1957); *Evans* v. *Abney*, 396 U.S. 435 (1970).

Under the Victor Wilson Trust, a trust fund has been created for deserving Kansas City, Missouri boys to acquire an education at either Yale University or UMKC. There is no issue in this case that the terms of this Will are not abundantly clear in limiting the right to income from this Trust to males as opposed to females. There is no allegation in Petitioner's Second Amended Petition that the Respondent Trustee is not administering the Trust precisely in accordance with its terms. Under those terms, the income of the Trust is to be used to assist one or

more boys living in Kansas City, Missouri and who possess unusual ability or talent and who are financially unable to obtain a university education to attend either Yale University or UMKC.

Petitioner, concededly, at the time the action was commenced was then a female law student at UMKC and, as such, was not within the class of beneficiaries delineated by the Will. A finding to the contrary would have required the Supreme Court of Missouri to determine not only that state action was involved so as to bring the case within the parameters of the Fourteenth Amendment and 42 U.S.C. §1983, but also that the limitation to males as opposed to females, within the context of this particular Will, is discriminatory.[1]

A finding that state action was involved here would have gone contrary to the established principle stated in *Burton* that individual invasion of individual rights is not the subject matter of the Fourteenth Amendment. *Burton* v. *Wilmington Parking Authority, supra,* 721-722. As recognized by this Court in *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 173 (1972):

> "The Court has never held . . . that discrimination by an otherwise private party would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. . . . Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discrimination,' *Reitman* v. *Mulkey,* 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition."

1. A plurality of this Court in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973) held that sex was a suspect classification, but a majority of the Court has not come to that conclusion. See also, *Reed* v. *Reed,* 404 U.S. 71 (1971); *Caban* v. *Mohammed,* ..... U.S. ....., 47 L.W. 4462, 4467 (1979).

What the Respondent Trustee has consistently done is to carry out the intent of the testator, an intent clearly expressed within the four corners of the instrument, to provide funds from the income of the property held in trust for the education of boys residing in Kansas City, Missouri. The argument which the Petitioner makes before this Court that sexual discrimination proscribed by the Fourteenth Amendment is involved here is really tantamount to saying that all charitable trusts in which a trustee is required to distribute the funds of that trust only within certain limits results in unlawful discrimination. This is a contention as surprising as it is novel. There are numerous well-known charitable organizations, for instance, which limit membership based on sex. For example, the Bylaws of the United States Jaycees which limit membership to males does not infringe on constitutional rights of females. *Junior C. of C. of Rochester, Inc., N. Y.* v. *U. S. Jaycees, Tulsa, Okla.,* 495 F.2d 883 (10th Cir.), *cert. denied,* 419 U.S. 1026 (1974).

Many trusts involve limitations on the class of beneficiaries which can be benefited by the particular trust. See, for example, *Smith* v. *Moore,* 343 F.2d 594 (4th Cir. 1965) [clinic established by a trust to minister to "worthy white persons"]; *Shannon* v. *Eno,* 179 Atl. 479 (Conn. 1935) [gift for "worthy Protestant women over 60 years of age"]; *Averill* v. *Lewis,* 138 Atl. 815 (Conn. 1927) [trust for "white, Protestant Female Teachers"]; *Beardsley* v. *Bridgeport,* 3 Atl. 557 (Conn. 1886) [bequest for the benefit of "worthy, deserving, poor, white, American, Protestant Democratic widows and orphans residing in the town of Bridgeport, Connecticut"]; *Howard Sav. Institution* v. *Peep,* 170 A.2d 39 (N.J. 1961) [trust for American born,

Protestant Gentile boys]; *Moore* v. *Denver*, 292 P.2d 986 (Colo. 1956) [trust for benefit of "poor, white male orphans"]. Yet this Court has stated in *Evans* v. *Newton*, *supra*, 300, that:

> "If a testator wanted to leave a school or center for the use of one race only, and in no way implicated the State . . . we assume *arguendo* that no Constitutional difficulty would be encountered."

This Court has further recognized that, where the impetus for the discrimination is private (assuming that there is discrimination here for the sake of argument), the state must have "significantly involved itself with invidious discrimination" [*Reitman* v. *Mulkey*, *supra*, 380] in order for the discriminatory action to fall within the ambit of constitutional prohibitions.

The Supreme Court of Missouri found that Victor Wilson was not an agent of the state, but a private individual who had amassed a fortune and had a perfect right to divide his money to any person or organization he desired even if his choice of beneficiaries was limited. Not one cent of public money went into the Trust. The Trust was and is administered by a private Trustee. That Court specifically found that "[d]iscrimination on the basis of sex results from Mr. Wilson's personal predilection." 576 S.W.2d 310, 320.

The process for selecting beneficiaries of the Trust Fund was as set forth in the opinion of the Supreme Court of Missouri. It is evident from an examination of that process that the selection of students for approval by the Trustee is selection within the context of the limitation proscribed under Victor Wilson's Will; that is, a selection among Kansas City, Missouri boys who otherwise qualify under the terms of the Will. This does not imply

or mean that any state agency is acting to deny funds to female students, but only that the judges appointed by UMKC are selecting among those Kansas City, Missouri boys who apply. The prohibition against selecting females comes not from the UMKC judges, but rather from the clear terms of the Victor Wilson Trust. The ultimate authority for determining who receives funds resides with the Trustee. Under the terms of the instrument, applicants must be "approved by the Trustees of the said Fund." (sic) The Trustee is affirmatively directed, under the terms of the instrument, to "discontinue supporting any student failing to make satisfactory grades while attending either of said Universities." The function of the University is simply a ministerial one. It selects among the category of potential beneficiaries as defined by Victor Wilson. A list of otherwise acceptable male students is forwarded to the Trustee which must then decide to approve or disapprove any tentative award.

The judges appointed by UMKC may not consider female students because such students are not within the class of permissible income beneficiaries. In fact, a referral to the Trustee of the names of female students would be a futile act. The Will itself precludes the Trustee from awarding benefits to females. The key to a finding of "state action" is the participation of a state agency in effecting the discrimination itself. And here the discrimination, if any, emanates from the testator, a private individual who may dispose of his money and property as he wishes absent state action.

As such the facts of this case are distinguishable from those cases in which the trustee itself was a governmental body. For example, in *Evans* v. *Newton*, *supra*, Senator Bacon had left certain land in Macon, Georgia, to the "mayor and City Council of Macon, Georgia" in trust,

to be operated as a public park for "white persons only." This Court ruled that state action was involved since the trustee charged with the duty of carrying out the provisions of the trust was itself a subdivision of the state, and could not perform its duties under the trust without violating the Fourteenth Amendment. In fact the cases which have overturned discriminatory charitable grants have either involved appointment of a city or county as trustee of the discriminatory trust [*Evans* v. *Newton, supra*; *Pennsylvania* v. *Board of Directors of City Trust, supra*; *Commonwealth* v. *Brown*, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968); *LaFond* v. *Detroit*, 98 N.W.2d 530 (Mich. 1959)] or an attempt to use a court to force or compel discrimination by an unwilling trustee [*Sweet Briar Institute* v. *Button*, 280 F.Supp. 312 (W.D.Va. 1967); *Bank of Delaware* v. *Buckson*, 255 A.2d 710 (Del. Ch. 1969)].

State action, as found by the Supreme Court of Missouri, is simply not involved here in the Respondent Trustee's carrying out the clear directive of Article VIII of the Will of Victor Wilson. The "impetus" for the selection of males emanates from the Victor Wilson Trust, not from the ministerial act of UMKC in screening out candidates from the trust-designated class of "deserving Kansas City, Missouri boys".

II

The Supreme Court of Missouri Correctly Applied Established Standards of Review in Affirming the Trial Court's Dismissal of Petitioner's Second Amended Petition

The Petitioner complains not only that the Supreme Court of Missouri was wrong in its application of the

Burton principles in finding no state action, but also that the case was resolved on the basis of a motion to dismiss, without the production of evidence at trial (Pet. 10-11).

The process and procedure involved in the award of funds from the Trust, as set forth in the Court's opinion, was derived "from the petition, answers to interrogatories, and the motions to dismiss. . . ." 576 S.W.2d 310, 317. It is unclear to this Respondent on what additional facts Petitioner would seek to present evidence (Pet. 11). It certainly cannot be said that, in view of the Supreme Court of Missouri's recitation, the issues were found, as Petitioner claims, "without any evidence on the issue." Even Petitioner concedes that interrogatory answers were referred to (Pet. 10). The Supreme Court of Missouri made reference to the same type of evidence which has been referred to in rulings on motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Wright & Miller, *Federal Practice and Procedure*, Section 1364, p. 669.

Procedurally, the case was in a posture where considerably more "evidence" was before the Supreme Court of Missouri than was before this Court when it affirmed dismissals of complaints involving state action issues in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) and *Flagg Brothers, Inc.* v. *Brooks*, 98 S.Ct. 1729, 1738 (1978).

Scheuer v. *Rhodes*, 416 U.S. 232, 235 (1974), relied upon by Petitioner (Pet. 10-11), not only did not involve a state action question, but also involved motions to dismiss granted even before answers were filed. Even in *Scheuer*, this Court recognized that the case might be resolved on the basis of summary judgment and might not require a trial on the merits. 416 U.S. at 250.

CONCLUSION

The Petitioner presents no questions which are novel and important, none that has not heretofore been settled and resolved in a manner entirely consistent with the decisions of this Court, and none that suggests the necessity or desirability of re-examination by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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